

REQUEST: NON-COMPETITIVE CONTRACT

APPROVED

Commissioner of Finance & Administration

Date:

RFS #	331.115-035		
SERVICE :	Support of the Tennessee Value-Added Assessment System		
PROPOSED CONTRACTOR :	SAS Institute		
MAXIMUM COST (including all options to extend) :	\$5,668,999.80		
START DATE (≥ 60 days after F&A receipt of request) :	January 1, 2005		
END DATE (including all options to extend) :	December 31, 2010		
APPROVAL CRITERIA (select one) :			
<input type="checkbox"/> use of Non-Competitive Negotiation is in the best interest of the state			
<input checked="" type="checkbox"/> only one uniquely qualified service provider able to provide the service			
ATTACHED DOCUMENTATION : (attach a written request on agency letterhead, signed and dated by the ACTUAL procuring agency head (signature by an authorized signatory will be accepted only in documented exigent circumstances); the request must reference the item numbers below and detail or attach documentation of each)			
1) description of service to be acquired; 2) explanation of the need for or requirement placed on the procuring agency to acquire the service; 3) explanation of whether the service was ever bought by the procuring agency in the past, and if so, what method was used to acquire it; 4) name and address of the proposed contractor's principal owner(s) (not required if proposed contractor is a state education institution); 5) evidence that the proposed contractor has experience in providing the service and evidence of the length of time the contractor has provided service; 6) documentation of OIR endorsement of the Non-Competitive procurement request (required only if the subject service involves information technology); 7) documentation of Department of Personnel endorsement of the Non-Competitive procurement request (required only if the subject service involves training for state employees); 8) description of procuring agency efforts to identify reasonable, competitive, procurement alternatives (rather than to use non-competitive negotiation); and 9) justification of why the state should acquire the service through Non-Competitive Negotiation rather than through a competitive process. (NOTE: Being the "only known" or "best" service provider to perform the service as desired is not deemed adequate justification.)			



STATE OF TENNESSEE
DEPARTMENT OF EDUCATION
6th FLOOR, ANDREW JOHNSON TOWER
710 JAMES ROBERTSON PARKWAY
NASHVILLE, TN 37243-0375

PHIL BREDESEN
GOVERNOR

LANA C. SEIVERS, Ed.D.
COMMISSIONER

TO: M.D. Goetz, Jr., Commissioner
Department of Finance and Administration

FROM: Lana C. Seivers

DATE: December 20, 2004

SUBJECT: Request for a non-competitive contract

1. Support of the Tennessee Value-Added Assessment System
2. Required by TCA
 - 49-1-603. Value added assessment system.
 - 49-1-604 Mixed model methodologies.
 - 49-1-605. Annual estimates of school district effects on student progress in grades three through eight (3-8).
 - 49-1-606. Annual estimates of teacher effects on student progress in grades three through eight (3-8).
 - 49-6-3050. Home School.
3. TDOE has utilized the services of SAS since 1991-1992, when TVAAS became required by State law.
4. SAS Institute, SAS Campus Drive, Cary, NC 27513
5. see number 3 above
6. N/A
7. N/A
8. TDOE has not attempted to find another vendor for this service; TVAAS is based upon a statistical methodology that is owned by SAS.
9. SAS was founded by Dr. William Sanders whose statistical methodology is the basis of TVAAS. This system, which is required by State Law, is not available through any other vendor.

Chris Eaton

From: Michael Timme [Michael.Timme@state.tn.us]
Sent: Thursday, December 23, 2004 3:32 PM
To: Chris.Eaton@legislature.state.state.tn.us
Cc: Tim Webb; Mary Reel; Dawn Darden
Subject: Non-Competitive contract request

Attachments: SAS request-non-comp 2.doc; SAS request-non-comp .doc



SAS



SAS

ist-non-comp 2.doc; ist-non-comp .doc (

Chris,

The attached request for a non-competitive contract with SAS Institute is required by TCA and SAS is the only company that provides the service. Does this need to be routed through the Fiscal Review Committee?

I'll be out of the office till Jan. 3 so give me a call or send me an email. Thanks.

Michael Timme, Contracts Coordinator
Department of Education
6th Floor, Andrew Johnson Tower
710 James Robertson Parkway
phone: 615-532-8539
fax: 615-253-5705
email: Michael.Timme@state.tn.us



PHIL BREDESEN
GOVERNOR

STATE OF TENNESSEE
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LANA C. SEIVERS, Ed.D.
COMMISSIONER

TO: M.D. Goetz, Jr., Commissioner
Department of Finance and Administration

FROM: Lana C. Seivers

DATE: January 10, 2005

SUBJECT: SAS Contract RFS #331.115-035

We have been notified that the above referenced contract must go before the Fiscal Review Committee. The services provided in this contract are required by Tennessee Code Annotated and we did not realize that a review would be required. As mentioned in our initial request, the TCA references are:

- 49-1-603. Value added assessment system.
- 49-1-604 Mixed model methodologies.
- 49-1-605. Annual estimates of school district effects on student progress in grades three through eight (3-8).
- 49-1-606. Annual estimates of teacher effects on student progress in grades three through eight (3-8).
- 49-6-3050. Home School.

49-1-603 (b) and 49-1-604 introductory paragraph in conjunction with the references cited establish SAS as the only supplier of analyses with the capacity to meet the intent of the statute.

TDOE has utilized this methodology since the first reporting in 1993; TVAAS was established in statute in 1992.

**CONTRACT
BETWEEN THE STATE OF TENNESSEE,
Department of Education
AND
SAS Institute, Inc.**

This Contract, by and between the State of Tennessee, Department of Education, hereinafter referred to as the "State" and SAS Institute Inc., hereinafter referred to as the "Contractor," is for the provision of services relating to the Tennessee Value-Added Assessment System, as further defined in the "SCOPE OF SERVICES."

The Contractor is a for-profit corporation. The Contractor's address is:

SAS Campus Drive, Cary, NC 27513

The Contractor's place of incorporation or organization is North Carolina.

A. SCOPE OF SERVICES:

A.1. See attachment A.

B. CONTRACT TERM:

B.1. Contract Term. This Contract shall be effective for the period commencing on January 1, 2005 and ending on December 31, 2009. The State shall have no obligation for services rendered by the Contractor which are not performed within the specified period.

C. PAYMENT TERMS AND CONDITIONS:

C.1. Maximum Liability. In no event shall the maximum liability of the State under this Contract exceed five million, six hundred sixty-eight thousand, nine hundred ninety-nine dollars and eighty cents (\$5,668,999.80). The Service Rates in Section C.3 shall constitute the entire compensation due the Contractor for the Service and all of the Contractor's obligations hereunder regardless of the difficulty, materials or equipment required. The Service Rates include, but are not limited to, all applicable taxes, fees, overheads, and all other direct and indirect costs incurred or to be incurred by the Contractor.

The Contractor is not entitled to be paid the maximum liability for any period under the Contract or any extensions of the Contract for work not requested by the State. The maximum liability represents available funds for payment to the Contractor and does not guarantee payment of any such funds to the Contractor under this Contract unless the State requests work and the Contractor performs said work. In which case, the Contractor shall be paid in accordance with the Service Rates detailed in Section C.3. The State is under no obligation to request work from the Contractor in any specific dollar amounts or to request any work at all from the Contractor during any period of this Contract.

C.2. Compensation Firm. The Service Rates and the Maximum Liability of the State under this Contract are firm for the duration of the Contract and are not subject to escalation for any reason unless amended.

C.3. Payment Methodology. The Contractor shall be compensated based on the Service Rates herein for units of service authorized by the State in a total amount not to exceed the Contract Maximum Liability established in Section C.1. The Contractor's compensation shall be contingent upon the

satisfactory completion of units of service or project milestones defined in Section A. The Contractor shall be compensated based upon the following Service Rates:

<u>SERVICE UNIT/MILESTONE</u>	<u>AMOUNT</u>
Monthly	\$94,483.33

The Contractor shall submit monthly invoices, in form and substance acceptable to the State with all of the necessary supporting documentation, prior to any payment. Such invoices shall be submitted for completed units of service or project milestones for the amount stipulated.

- C.4. Travel Compensation. The Contractor shall not be compensated or reimbursed for travel, meals, or lodging.
- C.5. Payment of Invoice. The payment of the invoice by the State shall not prejudice the State's right to object to or question any invoice or matter in relation thereto. Such payment by the State shall neither be construed as acceptance of any part of the work or service provided nor as an approval of any of the amounts invoiced therein.
- C.6. Invoice Reductions. The Contractor's invoice shall be subject to reduction for amounts included in any invoice or payment theretofore made which are determined by the State, on the basis of audits conducted in accordance with the terms of this contract, not to constitute proper remuneration for compensable services.
- C.7. Deductions. The State reserves the right to deduct from amounts which are or shall become due and payable to the Contractor under this or any contract between the Contractor and the State of Tennessee any amounts which are or shall become due and payable to the State of Tennessee by the Contractor.
- C.8. Automatic Deposits. The Contractor shall complete and sign an "Authorization Agreement for Automatic Deposit (ACH Credits) Form." This form shall be provided to the Contractor by the State. Once this form has been completed and submitted to the State by the Contractor all payments to the Contractor, under this or any other contract the Contractor has with the State of Tennessee shall be made by Automated Clearing House (ACH). The Contractor shall not invoice the State for services until the Contractor has completed this form and submitted it to the State.
- D. STANDARD TERMS AND CONDITIONS:
- D.1. Required Approvals. The State is not bound by this Contract until it is approved by the appropriate State officials in accordance with applicable Tennessee State laws and regulations.
- D.2. Modification and Amendment. This Contract may be modified only by a written amendment executed by all parties hereto and approved by the appropriate Tennessee State officials in accordance with applicable Tennessee State laws and regulations.
- D.3. Termination for Convenience. The State may terminate this Contract without cause for any reason. Said termination shall not be deemed a Breach of Contract by the State. The State shall give the Contractor at least sixty (60) days written notice before the effective termination date. The Contractor shall be entitled to receive compensation for satisfactory, authorized service completed as of the termination date, but in no event shall the State be liable to the Contractor for compensation for any service which has not been rendered. Upon such termination, the Contractor shall have no right to any actual general, special, incidental, consequential, or any other damages whatsoever of any description or amount.

- D.4. Termination for Cause. If the Contractor fails to properly perform its obligations under this Contract in a timely or proper manner, or if the Contractor violates any terms of this Contract, the State shall have the right to immediately terminate the Contract and withhold payments in excess of fair compensation for completed services. Notwithstanding the above, the Contractor shall not be relieved of liability to the State for damages sustained by virtue of any breach of this Contract by the Contractor.
- D.5. Subcontracting. The Contractor shall not assign this Contract or enter into a subcontract for any of the services performed under this Contract without obtaining the prior written approval of the State. If such subcontracts are approved by the State, they shall contain, at a minimum, sections of this Contract pertaining to "Conflicts of Interest" and "Nondiscrimination" (sections D.6. and D.7.). Notwithstanding any use of approved subcontractors, the Contractor shall be the prime contractor and shall be responsible for all work performed.
- D.6. Conflicts of Interest. The Contractor warrants that no part of the total Contract Amount shall be paid directly or indirectly to an employee or official of the State of Tennessee as wages, compensation, or gifts in exchange for acting as an officer, agent, employee, subcontractor, or consultant to the Contractor in connection with any work contemplated or performed relative to this Contract.
- D.7. Nondiscrimination. The Contractor hereby agrees, warrants, and assures that no person shall be excluded from participation in, be denied benefits of, or be otherwise subjected to discrimination in the performance of this Contract or in the employment practices of the Contractor on the grounds of disability, age, race, color, religion, sex, national origin, or any other classification protected by Federal, Tennessee State constitutional, or statutory law. The Contractor shall, upon request, show proof of such nondiscrimination and shall post in conspicuous places, available to all employees and applicants, notices of nondiscrimination.
- D.8. Records. The Contractor shall maintain documentation for all charges against the State under this Contract. The books, records, and documents of the Contractor, insofar as they relate to work performed or money received under this contract, shall be maintained for a period of three (3) full years from the date of the final payment and shall be subject to audit at any reasonable time and upon reasonable notice by the State, the Comptroller of the Treasury, or their duly appointed representatives. The financial statements shall be prepared in accordance with generally accepted accounting principles.
- D.9. Monitoring. The Contractor's activities conducted and records maintained pursuant to this Contract shall be subject to monitoring and evaluation by the State, the Comptroller of the Treasury, or their duly appointed representatives.
- D.10. Progress Reports. The Contractor shall submit brief, periodic, progress reports to the State as requested.
- D.11. Strict Performance. Failure by any party to this Contract to insist in any one or more cases upon the strict performance of any of the terms, covenants, conditions, or provisions of this Contract shall not be construed as a waiver or relinquishment of any such term, covenant, condition, or provision. No term or condition of this Contract shall be held to be waived, modified, or deleted except by a written amendment signed by the parties hereto.
- D.12. Independent Contractor. The parties hereto, in the performance of this Contract, shall not act as employees, partners, joint venturers, or associates of one another. It is expressly acknowledged by the parties hereto that such parties are independent contracting entities and that nothing in this Contract shall be construed to create an employer/employee relationship or to allow either to exercise control or direction over the manner or method by which the other transacts its business affairs or provides its usual services. The employees or agents of one party shall not be deemed or construed to be the employees or agents of the other party for any purpose whatsoever.

The Contractor, being an independent contractor and not an employee of the State, agrees to carry adequate public liability and other appropriate forms of insurance, including adequate public liability and other appropriate forms of insurance on the Contractor's employees, and to pay all applicable taxes incident to this Contract.

- D.13. State Liability. The State shall have no liability except as specifically provided in this Contract.
- D.14. Force Majeure. The obligations of the parties to this contract are subject to prevention by causes beyond the parties' control that could not be avoided by the exercise of due care including, but not limited to, acts of God, riots, wars, strikes, epidemics or any other similar cause.
- D.15. State and Federal Compliance. The Contractor shall comply with all applicable State and Federal laws and regulations in the performance of this Contract.
- D.16. Governing Law. This Contract shall be governed by and construed in accordance with the laws of the State of Tennessee. The Contractor agrees that it will be subject to the exclusive jurisdiction of the courts of the State of Tennessee in actions that may arise under this Contract. The Contractor acknowledges and agrees that any rights or claims against the State of Tennessee or its employees hereunder, and any remedies arising therefrom, shall be subject to and limited to those rights and remedies, if any, available under **Tennessee Code Annotated**, Sections 9-8-101 through 9-8-407.
- D.17. Completeness. This Contract is complete and contains the entire understanding between the parties relating to the subject matter contained herein, including all the terms and conditions of the parties' agreement. This Contract supersedes any and all prior understandings, representations, negotiations, and agreements between the parties relating hereto, whether written or oral.
- D.18. Severability. If any terms and conditions of this Contract are held to be invalid or unenforceable as a matter of law, the other terms and conditions hereof shall not be affected thereby and shall remain in full force and effect. To this end, the terms and conditions of this Contract are declared severable.
- D.19. Headings. Section headings of this Contract are for reference purposes only and shall not be construed as part of this Contract.

E. SPECIAL TERMS AND CONDITIONS:

- E.1. Conflicting Terms and Conditions. Should any of these special terms and conditions conflict with any other terms and conditions of this Contract, these special terms and conditions shall control.
- E.2. Communications and Contacts. All instructions, notices, consents, demands, or other communications required or contemplated by this Contract shall be in writing and shall be made by facsimile transmission, by overnight courier service, or by first class mail, postage prepaid, addressed to the respective party at the appropriate facsimile number or address as set forth below or to such other party, facsimile number, or address as may be hereafter specified by written notice.

The State:

Dr. Keith Brewer, Deputy Commissioner
Department of Education
6th Floor, Andrew Johnson Tower
710 James Robertson Parkway
Nashville, Tennessee 37243
(615) 741-2731

The Contractor:
 Dr. June Rivers
 SAS Institute, Inc.
 SAS Campus Drive, U-4114
 Cary, NC 27513
 (919) 531-1075

With a required copy of all legal notices to:

Office of General Counsel
 SAS Institute, Inc.
 SAS Campus Drive
 Cary, NC 27513

All instructions, notices, consents, demands, or other communications shall be considered effectively given as of the day of delivery; as of the date specified for overnight courier service delivery; as of three (3) business days after the date of mailing; or on the day the facsimile transmission is received mechanically by the telefax machine at the receiving location and receipt is verbally confirmed by the sender if prior to 4:30 p.m. CST. Any communication by facsimile transmission shall also be sent by United States mail on the same date of the facsimile transmission.

E.3. Subject to Funds Availability. The Contract is subject to the appropriation and availability of State and/or Federal funds. In the event that the funds are not appropriated or are otherwise unavailable, the State reserves the right to terminate the Contract upon written notice to the Contractor. Said termination shall not be deemed a breach of Contract by the State. Upon receipt of the written notice, the Contractor shall cease all work associated with the Contract. Should such an event occur, the Contractor shall be entitled to compensation for all satisfactory and authorized services completed as of the termination date. Upon such termination, the Contractor shall have no right to recover from the State any actual, general, special, incidental, consequential, or any other damages whatsoever of any description or amount.

E.4. Breach. A party shall be deemed to have breached the Contract if any of the following occurs:

- failure to perform in accordance with any term or provision of the Contract;
- partial performance of any term or provision of the Contract;
- any act prohibited or restricted by the Contract, or
- violation of any warranty.

For purposes of this contract, these items shall hereinafter be referred to as a "Breach."

a. Contractor Breach— The State shall notify Contractor in writing of a Breach.

- (1) In event of a Breach by Contractor, the state shall have available the remedy of Actual Damages and any other remedy available at law or equity.
- (2) Liquidated Damages— In the event of a Breach, the State may assess Liquidated Damages. The State shall notify the Contractor of amounts to be assessed as Liquidated Damages. The parties agree that due to the complicated nature of the Contractor's obligations under this Contract it would be difficult to specifically designate a monetary amount for a Breach by Contractor as said amounts are likely to be uncertain and not easily proven. Contractor hereby represents and covenants it has carefully reviewed the Liquidated Damages contained in above referenced, Attachment B and agree that said amounts represent a reasonable relationship between the amount and what might reasonably be expected in the

event of Breach, and are a reasonable estimate of the damages that would occur from a Breach. It is hereby agreed between the parties that the Liquidated Damages represent solely the damages and injuries sustained by the State in losing the benefit of the bargain with Contractor and do not include any injury or damage sustained by a third party. The Contractor agrees that the liquidated damage amount is in addition to any amounts Contractor may owe the State pursuant to the indemnity provision or other section of this Contract.

The State may continue to withhold the Liquidated Damages or a portion thereof until the Contractor cures the Breach, the State exercises its option to declare a Partial Default, or the State terminates the Contract. The State is not obligated to assess Liquidated Damages before availing itself of any other remedy. The State may choose to discontinue Liquidated Damages and avail itself of any other remedy available under this Contract or at law or equity; provided, however, Contractor shall receive a credit for said Liquidated Damages previously withheld except in the event of a Partial Default.

- (3) Partial Default— In the event of a Breach, the State may declare a Partial Default. In which case, the State shall provide the Contractor written notice of: (1) the date which Contractor shall terminate providing the service associated with the Breach; and (2) the date the State will begin to provide the service associated with the Breach. Notwithstanding the foregoing, the State may revise the time periods contained in the notice written to the Contractor.

In the event the State declares a Partial Default, the State may withhold, together with any other damages associated with the Breach, from the amounts due the Contractor the greater of: (1) amounts which would be paid the Contractor to provide the defaulted service; or (2) the cost to the State of providing the defaulted service, whether said service is provided by the State or a third party. To determine the amount the Contractor is being paid for any particular service, the Department shall be entitled to receive within five (5) days any requested material from Contractor. The State shall make the final and binding determination of said amount.

The State may assess Liquidated Damages against the Contractor for any failure to perform which ultimately results in a Partial Default with said Liquidated Damages to cease when said Partial Default is effective. Upon Partial Default, the Contractor shall have no right to recover from the State any actual, general, special, incidental, consequential, or any other damages whatsoever of any description or amount. Contractor agrees to cooperate fully with the State in the event a Partial Default is taken

- (4) Contract Termination— In the event of a Breach, the State may terminate the Contract immediately or in stages. The Contractor shall be notified of the termination in writing by the State. Said notice shall hereinafter be referred to as Termination Notice. The Termination Notice may specify either that the termination is to be effective immediately, on a date certain in the future, or that the Contractor shall cease operations under this Contract in stages. In the event of a termination, the State may withhold any amounts which maybe due Contractor without waiver of any other remedy or damages available to the State at law or at equity. The Contractor shall be liable to the State for any and all damages incurred by the State and any and all expenses incurred by the State which exceed the amount the State would have paid Contractor under this Contract. Contractor agrees to cooperate with the State in the event of a Contract Termination or Partial Takeover.

- b. **State Breach**— In the event of a Breach of contract by the State, the Contractor shall notify the State in writing within 30 days of any Breach of contract by the State. Said notice shall contain a description of the Breach. Failure by the Contractor to provide said written notice shall operate as an absolute waiver by the Contractor of the State's Breach. In no event shall any Breach on the part of the State excuse the Contractor from full performance under this Contract. In the event of Breach by the State, the Contractor may avail itself of any remedy at law in the forum with appropriate jurisdiction; provided, however, failure by the Contractor to give the State written notice and opportunity to cure as described herein operates as a waiver of the State's Breach. Failure by the Contractor to file a claim before the appropriate forum in Tennessee with jurisdiction to hear such claim within one (1) year of the written notice of Breach shall operate as a waiver of said claim in its entirety. It is agreed by the parties this provision establishes a contractual period of limitations for any claim brought by the Contractor.
- E.5. **Partial Takeover.** The State may, at its convenience and without cause, exercise a partial takeover of any service which the Contractor is obligated to perform under this Contract, including but not limited to any service which is the subject of a subcontract between Contractor and a third party, although the Contractor is not in Breach (hereinafter referred to as "Partial Takeover"). Said Partial Takeover shall not be deemed a Breach of Contract by the State. Contractor shall be given at least 30 days prior written notice of said Partial Takeover with said notice to specify the area(s) of service the State will assume and the date of said assumption. Any Partial Takeover by the State shall not alter in any way Contractor's other obligations under this Contract. The State may withhold from amounts due the Contractor the amount the Contractor would have been paid to deliver the service as determined by the State. The amounts shall be withheld effective as of the date the State assumes the service. Upon Partial Takeover, the Contractor shall have no right to recover from the State any actual, general, special, incidental, consequential, or any other damages whatsoever of any description or amount.
- E.6. **State Ownership of Work Products.** The State shall have all ownership right, title, and interest, including ownership of copyright, in all work products created, designed, developed, derived, documented, installed, or delivered to the State under this Contract. The State shall have royalty-free and unlimited rights to use, disclose, reproduce, or publish, for any purpose whatsoever, all said work products. The Contractor shall furnish such information and data upon request of the State, in accordance with the Contract and applicable State law.
- E.7. **Public Funding Notice.** All notices, informational pamphlets, press releases, research reports, signs, and similar public notices prepared and released by the Contractor relative to this Contract shall include the statement, "This project is funded under an agreement with the State of Tennessee." Any such notices by the Contractor shall be approved by the State.
- E.8. **Prohibited Advertising.** The Contractor shall not refer to this Contract or the Contractor's relationship with the State hereunder in commercial advertising in such a manner as to state or imply that the Contractor or the Contractor's services are endorsed.
- E.9. **Confidentiality of Records.** Strict standards of confidentiality of records shall be maintained in accordance with the law. All material and information, regardless of form, medium or method of communication, provided to the Contractor by the State or acquired by the Contractor on behalf of the State shall be regarded as confidential information in accordance with the provisions of State law and ethical standards and shall not be disclosed, and all necessary steps shall be taken by the Contractor to safeguard the confidentiality of such material or information in conformance with State law and ethical standards.

The Contractor will be deemed to have satisfied its obligations under this section by exercising the same level of care to preserve the confidentiality of the State's information as the Contractor exercises to protect its own confidential information so long as such standard of care does not violate the applicable provisions of the first paragraph of this section.

The Contractor's obligations under this section do not apply to information in the public domain; entering the public domain but not from a breach by the Contractor of this Contract; previously possessed by the Contractor without written obligations to the State to protect it; acquired by the Contractor without written restrictions against disclosure from a third party which, to the Contractor's knowledge, is free to disclose the information; independently developed by the Contractor without the use of the State's information; or, disclosed by the State to others without restrictions against disclosure.

It is expressly understood and agreed the obligations set forth in this section shall survive the termination of this Contract.

- E.10. Copyrights and Patents. The Contractor agrees to indemnify and hold harmless the State of Tennessee as well as its officers, agents, and employees from and against any and all claims or suits which may be brought against the State for infringement of any laws regarding patents or copyrights which may arise from the Contractor's performance of this Contract. In any such action brought against the State, the Contractor shall satisfy and indemnify the State for the amount of any final judgment for infringement. The Contractor further agrees it shall be liable for the reasonable fees of attorneys for the State in the event such service is necessitated to enforce the terms of this Contract or otherwise enforce the obligations of the Contractor to the State. The State shall give the Contractor written notice of any such claim or suit and full right and opportunity to conduct the Contractor's own defense thereof.
- E.11. Date/Time Hold Harmless. As required by **Tennessee Code Annotated**, Section 12-4-118, the contractor shall hold harmless and indemnify the State of Tennessee; its officers and employees; and any agency or political subdivision of the State for any breach of contract caused directly or indirectly by the failure of computer software or any device containing a computer processor to accurately or properly recognize, calculate, display, sort or otherwise process dates or times.
- E.12. Hold Harmless. The Contractor agrees to indemnify and hold harmless the State of Tennessee as well as its officers, agents, and employees from and against any and all claims, liabilities, losses, and causes of action which may arise, accrue, or result to any person, firm, corporation, or other entity which may be injured or damaged as a result of acts, omissions, or negligence on the part of the Contractor, its employees, or any person acting for or on its or their behalf relating to this Contract. The Contractor further agrees it shall be liable for the reasonable cost of attorneys for the State in the event such service is necessitated to enforce the terms of this Contract or otherwise enforce the obligations of the Contractor to the State.
- In the event of any such suit or claim, the Contractor shall give the State immediate notice thereof and shall provide all assistance required by the State in the State's defense. The State shall give the Contractor written notice of any such claim or suit, and the Contractor shall have full right and obligation to conduct the Contractor's own defense thereof. Nothing contained herein shall be deemed to accord to the Contractor, through its attorney(s), the right to represent the State of Tennessee in any legal matter, such rights being governed by **Tennessee Code Annotated**, Section 8-6-106.
- E.13. Software Development. It is expressly understood that the contracted services will not require the development of new software or modification of existing software and that the only work products under this Contract are reports. Contractor acknowledges and agrees that all data supplied by the State pursuant to this Contract remains the property of the State in all forms. Contractor shall obtain the written permission of the Commissioner of Education prior to the use of such data other than for the fulfillment of Contractor's obligations under this Contract.
- E.14. Web Site Related. The State acknowledges it is solely responsible for, and maintains complete ownership of, the data used by the Contractor for display on the web site and for notifying the Contractor of specific assigned levels of public and restricted access authority to be granted on

the web site. If the Contractor is not in default under the terms of Paragraph A.5 of the Scope of Services contained in Attachment A to the Contract, the State acknowledges it is solely responsible for damages, costs and expenses incurred by the Contractor relating to claims by any third party against the Contractor arising out of the performance of its obligations under Paragraph A.5 of the Scope of Services contained in Attachment A to the Contract. It is agreed by both parties that upon given immediate notice by the Contractor, the Contractor reserves the right to terminate the Contract without penalty, if the Contractor's obligations hereunder will violate any applicable U. S. law or regulation.

- E.13 Regarding In Kind Contributions. The Contractor accepts the limitation of the service rates detailed in Section C.3, but stresses to the State that its costs associated with delivering the contracted service are considerably higher and the Contractor is absorbing these uncompensated costs in its operation as a contribution toward success of the TVAAS program.

IN WITNESS WHEREOF:

SAS Institute, Inc.:

Karen Allen, Contract Manager

Date

DEPARTMENT OF EDUCATION:

Lana C. Seivers, Commissioner

Date

APPROVED:

DEPARTMENT OF FINANCE AND ADMINISTRATION:

M. D. Goetz Jr., Commissioner

Date

DEPARTMENT OF PERSONNEL:

Randy C. Camp, Commissioner

Date

COMPTROLLER OF THE TREASURY:

John G. Morgan, Comptroller of the Treasury

Date

RFS # 331.115-035

ATTACHMENT A**A. SCOPE OF SERVICES:**

It is expressly understood that the following scope of services does not require the development of new software or modification to existing software to provide the services required by Tennessee statute to support the Tennessee Value-Added Assessment System.

1. The Contractor shall provide the capability to support the Tennessee Value-Added Assessment System to include the following:
 - a. To enable the estimation of system, school and teacher effects based upon data generated by the state-mandated tests administered in grades 3-8, High School Gateways, High School End of Course, and Writing for grades 5, 8, and 11. The State will provide to the Contractor by January 30 of each year a list of that year's state-mandated tests, along with a file description for each test administered, and a timeline indicating anticipated delivery of electronic data from each test to be included in that year's reporting provided by the Contractor.
 - b. To enable the estimation of system and school effects based upon data generated by the tests administered to determine college preparation.
 - c. Refinement of the means for detecting potential breaches of data integrity ("filters") will continue in coordination with the Office Evaluation and Assessment, Department of Education.
 - d. Further evaluation of alternatives for standard setting will be considered in order to provide options for the Commissioner of Education and the State Board of Education in the setting of achievement standards.
2. The Contractor shall conduct analyses of raw test scores necessary to ensure equated forms with previous years. The Contractor shall notify the State regarding results of analysis with any recommendations for any adjustment to scales for maintenance of consistency in equating test forms with previous years.
3. The Contractor shall provide electronic reporting in the fall of each year of schooling effects resulting from analyses of tests administered in the summer, fall and spring of the previous school year. This reporting shall include the following:
 - a. System reports
 - b. School reports
 - c. Teacher reports
4. The Contractor will develop procedures to provide forecasts of those individual students at risk of not meeting the state's standards in subsequent grades and subjects, including CRT's administered in grades 3-8, high school subjects, and college entrance requirements.
5. The Contractor shall enable web delivery of annual TVAAS Reports. The Contractor shall deliver, in a web environment, analytic tools for diagnostic purposes as set forth in the Restricted Access section below. For all of the following services, the hardware, software and personnel will be provided by the Contractor. The services will be delivered in two categories: Public Access and Restricted Access.

Public Access. The TVAAS reports, which are required by state statute to be made publicly available, will be hosted on server(s) that will provide public access through linkage from the State's web site(s). The availability of access will be determined by the

completion date of the necessary analyses and authorization by the Commissioner of Education. The Contractor will host a functional web site containing the most current TVAAS reports provided to the State under the Contract. The web site will be available to the general public through link(s) contained on applicable web page(s) maintained by the State

Restricted Access. Independently of the public access, other analytical results useful for diagnostic purposes as set forth in a-g below will be made available on a restricted access basis. These results will be web accessible with "drill down" capability. The Contractor will provide secure server(s) with access to be limited and controlled by authorizations provided by the Commissioner of Education. The Contractor will supply online the enrollment tools necessary for the above authorization. Contractor agrees to act reasonably to prevent unauthorized access but makes no warranty or guarantee regarding impenetrability of the server(s).

The following would represent the hierarchy of the available reports:

- a. District level TVAAS reports
 - b. District level gain by achievement reports
 - c. School level TVAAS reports
 - d. School level gain by achievement reports
 - e. Presentation of individual student prior history with graphical and tabular options that will include both raw data and the most probable achievement level estimates of each student's scores. If appropriate data are supplied, projections as to the rate of progress necessary for students to meet future standards will be included.
 - f. Projections of probability that students are on track to meet:
 - (i.) State standards in grades 3-8
 - (ii.) Gateway requirements
 - (iii.) High School End of Course Requirements
 - (iv.) Standards for admission to the State's universities
 - g. Online access to individual student test scores and student projections.
 - h. Report of comparable schools based on demographic information, with the ability to link to the Public Access information about each school listed.
 - i. Compliance reports mandated by the No Child Left Behind Act, provided the State provides written specifications for compliance, including a web delivery of the report card information required by state and federal statute for the state, systems and schools.
6. The Contractor shall conduct research studies for up to 20 days. The studies shall provide rigorous statistical analyses for research questions, defined by the Department, which will aid in the determination of effective policies and practices to facilitate improved rates of academic progress for Tennessee's students.

B. PERFORMANCE MEASURE:

The following describes quantitative, results-based, performance measures to evaluate successful completion of activities required by this contract. These measures are agreed by both parties to demonstrate results to be achieved.

The development, reporting, research, and services provided to the State Department of Education must provide appropriate data necessary to meet requirements specified in TCA 49-1-601, 602, 604, 606, 608, and 610 as described in the scope of services.

The design, completion, and delivery of a trend analysis. This analysis shall utilize the existing Tennessee achievement test database to generate trend lines from which determination can be

made regarding the change (or lack thereof) in achievement levels by grade and subject area covering the period 1991-through the most recently administered 3-8 tests, as well as other analyses necessary to identify impediments and accelerators of student academic growth. The analyses shall provide data at the system as well as state level.

ATTACHMENT B**LIQUIDATED DAMAGES SCHEDULE**

In the event of a Contractor Breach, an amount equal to one month of compensation will be withheld by the State as Liquidated Damages.